86-2035

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

GEORGE O. ALDRIDGE and
DAISY M. ALDRIDGE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether in a damage action governed by federal law an award for lost future earnings can be sustained where the refusal of the trial court to instruct the jury to reduce to present value relieves the plaintiff of the burden of proving the loss and results in a gross, unreduced, and overcompensatory award.

2. Whether a railroad, having taken reasonable precautions against all reasonably foreseeable risks of harm to its employee, can be found negligent under the Federal Employers' Liability Act ("FELA") for failing to prevent or protect against the criminal act of a third person, where there was neither evidence of any past similar occurrences nor other advance warning to the railroad that such intervention was likely to occur.

PARTIES TO THE PROCEEDING

George O. Aldridge ("Aldridge") and Daisy M. Aldridge were the appellees in the proceeding in the United States Court of Appeals for the Fourth Circuit, whose judgment is sought to be reviewed.

The Baltimore & Ohio Railroad Company ("B & O") was the appellant in the proceeding below. The B & O was dissolved effective April 30, 1987, on which date Petitioner The Chesapeake and Ohio Railway Company ("C & O") assumed all B & O assets, obligations, liabilities, rights and privileges.* For purposes of clarity, this

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* The C&O is a wholly owned subsidiary of CSX Corporation ("CSX"). Subsidiaries and affiliates of CSX and the C&O, other than those wholly owned by them, are as follows:

1. CSX Resources, Inc., a wholly owned subsidiary of CSX, has a partial interest in Mid-Allegheny Corporation.

2. The C&O has a partial interest in the following:

Petition continues to refer to the B & O in connection with matters preceding its dissolution.

---

a. Allegheny and Western Railway Company;
b. The Baltimore and Philadelphia Railroad Company;
c. Clearfield and Mahoning Railway Company;
d. Dayton and Michigan Railroad Company;
e. Dayton and Union Railroad Company;
f. The Home Avenue Railroad Company;
g. The Cleveland Terminal & Valley Railroad Company.

3. Western Maryland Railway Company, a wholly owned subsidiary of the C&C, has a partial interest in the Baltimore and Cumberland Valley Railroad Extension Company.

4. CSX Transportation, Inc., a wholly owned subsidiary of CSX, has a partial interest in the following:

a. Augusta and Summerville Railroad Company;
b. Beaver Street Tower Company;
c. Central Transfer Railway and Storage Company;
d. Chatham Terminal Company;
e. North Charleston Terminal Company;
f. Paducah & Illinois Railroad Company;
g. Winston-Salem Southbound Railway Company;
h. Woodstock & Blockton Railway Company.

5. Various subsidiaries of CSX have a partial interest in Richmond Washington Company, which in turn has a partial interest in the Richmond, Fredericksburg and Potomac Railroad Company.

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OPINIONS BELOW

The March 25, 1987 opinion of the United States Court of Appeals for the Fourth Circuit, on rehearing *en banc* of the vacated panel decision reported at 789 F.2d 1061 (App. 1a-18a), is reported at 814 F.2d 157 (4th Cir. 1987) (App. 19a-29a). The decision of the United States District Court for the District of Maryland, affirmed by the *en banc* Court of Appeals, is unreported These opinions are reproduced in the Appendix to this Petition (App. 30a-39a).

JURISDICTION

The judgment of the *en banc* Court of Appeals is dated March 25, 1987. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent sections of the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) are as follows:

> § 51. Every common carrier * * * shall be liable in damages to any person suffering injury while he is employer by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment * * *.
>
> § 56. * * * Under this Chapter an action may be brought in a . . . court of the United States * * *.

STATEMENT OF THE CASE

This case arose on June 19, 1981, when Aldridge filed suit in the United States District Court for the District of Maryland under FELA against the B & O and for common law negligence against a third person, Keith D. Brelsford ("Brelsford"), for injuries inflicted by Brelsford on September 9, 1978, when Aldridge, working as a crossing watchman for the B & O, was struck by Brelsford's car. Federal jurisdiction existed by virtue of: FELA's grant of concurrent federal and state court jurisdiction, 45 U.S.C. § 56; 28 U.S.C. § 1331; and diversity of citizenship between Aldridge and Brelsford, 28 U.S.C. § 1332(a).

It was established at trial that Aldridge was working his regular tour of duty at the Baltimore Street crossing in Cumberland, Maryland when, on the night in question, a B & O engine in the process of switching cars stopped in a position partially blocking the intersection.

Aldridge had already activated the traffic lights to red, stopping approaching drivers who might otherwise proceed through the intersection. As further protection, Aldridge positioned himself in the middle of the unblocked section of the crossing with a red light in his left hand and a white light in his right hand.

These safety measures, adopted by the B & O in light of experience that, absent an alert watchman, impatient motorists might attempt to enter a partially closed intersection, were sufficient to avert any foreseeable risk of harm to Aldridge. What in fact occurred was completely unanticipated. Brelsford, who was extremely intoxicated, ran the red traffic light protecting the crossing, stopped short at the track, and demanded that Aldridge let him through, which Aldridge refused to do. Nevertheless, without warning or explanation, and in what was later found by the District Court for Alleghany County, Maryland, to amount to criminal assault, for which he was convicted, Brelsford released his brake, swerved into the opposing line of traffic, struck and felled Aldridge, and left the scene without stopping. Two months after the accident, in November, 1978, Aldridge returned to the B & O's employ, resuming his regular duties as a crossing watchman, until he ceased work on January 3, 1981.

At trial, which began on August 8, 1983, default judgments were entered against Brelsford in favor of both Aldridge and the B & O as cross-claimant. The railroad moved for a directed verdict in the FELA action on the ground, *inter alia*, that no evidence of its negligence had been adduced by Aldridge, who had failed to establish any past similar incidents. The B & O's motion was denied. Also denied was the B & O's request for an instruction that any award for eight years' future wage loss, claimed by Aldridge, must be reduced to present worth. Instead, and despite Aldridge's failure to present any proof as to the appropriate discount rate, the jury was permitted to consider and return a verdict, in the

amount of $196,800.00, which included Aldridge's entire asserted gross lost future earnings.

The B & O's October 21, 1983 motion for post judgment relief, raising both objections, was denied by Order dated January 10, 1984 (App. 30a-31a), and Memorandum Opinion dated April 25, 1984 (App. 32a-39a). On May 15, 1984, the B & O filed a timely Amended Notice of Appeal of the decision to the United States Court of Appeals for the Fourth Circuit, resulting in affirmance on May 1, 1986, by a panel comprised of Judges Sprouse, Wilkinson, and, by designation, Boyle. In a separate concurring opinion, Judge Boyle expressed the view that the evidence as to lost future earnings was insufficient as a matter of law in that Aldridge had not reduced his claim to present value (App. 17a-18a).

On May 14, 1986, the B & O petitioned the Fourth Circuit for rehearing with a suggestion for rehearing *en banc*. The petition was granted by Order dated June 24, 1986 (App. 40a-41a), vacating the panel decision and expressing an interest in the issues of liability for negligence and burden of proof of the present value of lost future earnings.

On rehearing, the *en banc* Court of Appeals affirmed the panel's ruling on liability by a five to four majority, and on damages by a four judge plurality, Judge Phillips concurring specially. The dissenting opinion, written by Judge Chapman, concluded "that the panel has misapplied the standard defining reasonable foreseeability" (App. 25a), with the "unintended effect . . . to render nugatory this 'essential ingredient' of negligence." (App. 26a). With respect to the future earnings question, Judge Chapman reasoned that the B & O's entitlement to a present value instruction as a matter of federal substantive law does not depend on its introduction of evidence, which is the plaintiff's burden, and that Aldridge's "failure to do so adequately, even in the absence of any rejoinder by the defendant, entitles the defendant to judgment." (App. 27a).

REASONS FOR GRANTING THE WRIT

This FELA case presents two fundamental issues for the Court's resolution. The first question, whether a railroad's failure to prove the present value of its employee's claimed lost future earnings permits the employee to recover the gross undiscounted wage loss in patent overcompensation, is common to all damage actions arising under federal law, including antitrust, civil rights, and securities cases as well as FELA and Jones Act proceedings. The second question, whether an interstate railroad may be held responsible under FELA for the consequences to its crossing watchman of the unforeseen and unforeseeable gross recklessness and criminal assault by a drunk driver, in circumstances where the railroad has taken all reasonable safety precautions, touches the heart of the FELA negligence standard, 45 U.S.C. § 51.

Because the decision below conflicts with the holdings of this Court and with those of other United States Circuit Courts of Appeal on these substantial federal questions, the C & O requests, pursuant to Rule 17 of the Rules of the Supreme Court of the United States, that its Petition be granted.

I. THE DECISION TO ALLOCATE TO THE FELA DEFENDANT THE BURDEN OF PROVING THE PRESENT VALUE OF THE PLAINTIFF'S CLAIMED FUTURE LOST WAGES DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, FIFTH, SIXTH AND ELEVENTH CIRCUITS, AND IS IRRECONCILABLE WITH RECENT HOLDINGS OF THE SUPREME COURT.

At trial, the damages awarded to Alridge as compensation for lost future earnings were calculated "by multiplying the number of employment years lost by the plaintiff's annual salary" (App 35a), producing a gross wage loss of $114,142.00 (App. 36a). Neither party offered proof of, and the jury was not instructed as to, the discounted present value of that amount. Sustaining the verdict nonetheless, the trial court opined that the "B & O

was not entitled to an instruction on the discount because it had not offered any evidence on the point." (App. 38a).

The court below affirmed the trial court's refusal to grant the present value instruction requested by the B & O, on the theory that the railroad "having failed to present such evidence at trial, should [not] be permitted on appeal to complain of its absence." (App. 16a). According to the Fourth Circuit (App. 14a), if

> a defendant wishes the factfinder to reduce the gross amount of future lost wages to present value, he can present evidence probative of an appropriate interest rate and method of discount. The plaintiff, in turn, may offer evidence tending to prove that the award should be increased because inflation will diminish its current value. In that case the plaintiff must show what kind of and how much inflation.

A.

The allocation to the FELA defendant of the burden of proving the present worth of the plaintiff's future losses is squarely in conflict with the analogous decisions of other United States Circuit Courts of Appeal. Moreover, although the Supreme Court has not spoken directly to this question, it had ruled consistently in accordance with the basic principle, challenged by the Fourth Circuit and herein requested by Petitioner to be articulated and affirmed, that such burden must be on the employee seeking compensation.

In a long, unbroken line of cases, this Court has pronounced that although "no single method for determining present value is mandated by federal law. . . . an utter failure to instruct the jury that present value is the proper measure of a damage award is error." *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 413 (1985), *citing Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916), and *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). The continuing vigor

of the *Kelly* proposition, that undiscounted future wage loss awards are invalid as a matter of substantive FELA law, was unambiguously reaffirmed by this Court in its recent *Dickerson* decision.

Indeed, that an award based on gross lost future earnings unreduced to present worth affords "more than compensation", *id.* at 1349, and is therefore unsustainable, is "self-evident". *Kelly*, 241 U.S. at 489. In *Chesapeake & Ohio Ry. Co. v. Gainey*, 241 U.S. 494 (1916), the Court, relying on its companion *Kelly*, reversed such an overcompensatory judgment in circumstances where the present value question was not argued at trial, but was first raised by the railroad on appeal. Obviously, the Court regarded reduction to present value as a substantive element of the FELA plaintiff's damage claim, proof of which could not be excused by the defendant's silence.

The Third Circuit so holds. In a FELA action brought in the Third Circuit, "the failure to give an instruction on reduction of future lost earnings to present worth [is] reversible error . . . [and] the burden of producing evidence rest[s] with the plaintiff." *DiSabatino v. Nat'l R.R. Passenger Corp.*, 724 F.2d 394, 395 (3d Cir. 1984). The *DiSabatino* court reversed and remanded an unreduced damage verdict, as the Fourth Circuit should have done in this case.

B.

Not only is the decision below in direct conflict with the approach of the Third Circuit, it follows a 1982 Ninth Circuit opinion, *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622 (9th Cir. 1982), whose reasoning has subsequently been completely discredited by this Court.

In *Pfeifer*, the Court, in order to comply with the longstanding requirement that damage awards in cases governed by federal law be based on present value, while at the same time fairly accounting for inflation, but

vithout converting the "average accident trial . . . into a raduate seminar on economic forecasting", 462 U.S. at 48 (*quoting Doca v. Marina Mercante Nicaraguenese, .A.*, 634 F.2d 30, 39 (2d Cir. 1980), *cert. denied*, 451 J.S. 971 (1981)), declared it "necessary to choose an ppropriate below-market discount rate", which it indiated might acceptably range between one and three perent, if explained. *Id.* at 548-49. The Court then directed he trial court to "make a deliberate choice" of discount ate consistent with its opinion. *Id.* at 553.

The decision below is at odds with *Pfeifer* in at least wo critical respects. First, by imposing a burden of roving present value on the FELA defendant, and permitting the employee to recover a more than compensaory damage award unless such burden is met, the Fourth Circuit completely ignores *Kelly* and forgets that in *Pfeifer* itself, as in *Gainey*, neither "party offered any expert testimony concerning predicted future rates of nflation, the interest rate that could be appropriately used to discount future earnings to present value, or the possible connection between inflation rates and interest rates." *Id.* at 527. Compounding this error, but without making any "deliberate choice", the court below effectively adopted for the Fourth Circuit the very method of specific economic forecast strongly disapproved by this Court in *Pfeifer* as likely to convert trials into graduate economics seminars, and characterized as unreliable in any event. *Id.* at 548.

The Fourth Circuit's expressed concern that without "evidence of how to adjust for present value or inflation a jury instructed to make such calculations on its own right will present an award based on sheer speculation" (App. 16a), is entirely misplaced. First, the perceived problem can be cured more equitably and rationally by allocating the burden of proof to the party seeking to recover. The Third Circuit, consistent with its understanding that the "defendant is entitled to a charge which will direct the jury's attention to every item and

consideration which may substantially reduce the plaintiff's loss so that the jury does not charge the defendant with a loss which the plaintiff would never have to suffer", requires that "once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth. . . .", *Ballantine v. Central R.R. of New Jersey*, 460 F.2d 540, 544 (3d Cir. 1972), with the plaintiff bearing the burden of production. *Id.*; relied on in *DiSabatino, supra.*

In any event, the verdict affirmed by the Fourth Circuit in this case is patently based on "sheer speculation"; namely the hypothesis, here without any evidentiary basis, that wage growth and interest rates will exactly cancel each other during the eight year period of Aldridge's claimed future loss of earnings. The total offset presumption, which equates wage increases due to productivity gains as well as to inflation with returns on government bonds, was expressly rejected in *Pfeifer* as too unproven to sustain a rule of law to be imposed on unwilling litigants. 462 U.S. at 550-551.

Notably, the empirical evidence before the Court in 1983 when *Pfeifer* was decided reflected data developed during the highly inflationary 1970's, and in consequence was somewhat supportive of the offset theory. *See* Carlson, *Economic Analysis v. Courtroom Controversy: The Present Value of Future Earnings*, 62 A.B.A.J. 628, 630 (1976), citing as its source the Economic Report of the President, February 1975, pp. 287, 317. The more recent indicators are strongly to the contrary. As the Department of Labor, Bureau of Labor Statistics reported, in 1986, the average nonagricultural employee's wages increased from the prior year by only 1.9 percent, *Economic Report of the President*, Table B-42 at 293 (Jan. 1987), in relation to the 9.03 percent per annum rate reported by the Federal Reserve for 7 year government bonds in January, 1986. *Federal Reserve Bulletin*, Table 1.35, IN-

TEREST RATES, at A24 (May 1987); *see also* Stocks, Bonds Bills, and Inflation: 1986 Yearbook, Cricago; Ibbotson Associates, Capital Management Research Center (1986) at p. 64, explaining that since mid-1980, the returns on Treasury Bills, considered to be the only risk-free security, have substantially exceeded the inflation rate, so that the real riskless rate was 5.2 percent in the period 1981-1985.

C.

Not surprisingly, the other Courts of Appeal confronting the issue after *Pfeifer* have uniformly declined to adopt what Judge Chapman's dissent termed the "beguilingly attractive" (App. 29a), because simplistic, approach of the Fourth Circuit panel. The Second Circuit applies a discount rate of two percent "if the parties elect not to offer any evidence on the subject of either inflation or present value discount" or " 'where the evidence of a more appropriate rate is unconvincing'." *McCrann v. United States Lines, Inc.*, 803 F.2d 771, 775 (2d Cir. 1986), *quoting Doca, supra*, 634 F.2d at 40. The Sixth Circuit, consistent with its recognition that punitive damages are, as a matter of law, not recoverable under FELA, *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971), requires, even in the absence of evidentiary foundation, that a present value instruction be granted at the defendant's request. *Rodgers v. Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Kokesh v. American S.S. Co.*, 747 F.2d 1092 (6th Cir. 1984). Finally, the Fifth and Eleventh Circuits mandate adjustment of a lump-sum award for lost future wages according to the below market discount rate method favored by this Court in *Pfeifer*, and prohibit use of the specific forecast method. *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983). *Accord, Deakle v. Graham & Sons*, 756 F.2d 821 (11th Cir. 1985).

Especially in the circumstances of this case, the conflicts among the Second, Third, Fourth, Fifth, Sixth and

Eleventh Circuits' applications of this Court's holdings in *Kelly, Gainey, Pfeifer* and *Dickerson*, demand resolution. Uniformity and predictability are destroyed, confusion and doubt created, and wasteful forum shopping promoted, if one appellate court is permitted to adopt a rule that relieves the employee of the burden of proving an essential element of his FELA cause of action, and systematically permits him to recover more than the sum necessary to compensate for his injury (App. 29a).

This circumstance defeats the legislative intent. As this Court recognized in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), "[o]ne of the purposes of the Federal Employers' Liability Act was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." 444 U.S. at 493 n. 5. This policy is seriously undermined by the direct conflict between the Fourth and Third Circuits, where the same evidence of future wage loss produces opposing outcomes, depending on the party assigned the burden of proving present value and on the proof adduced. The resulting uncertainty is compounded by the confusion among the Second, Fifth, Sixth and Eleventh Circuits, which, while agreeing that some present value instruction must be granted at the defendant's request, are not in consensus as to the content of that instruction.

The practical consequences are likely to be broad as well as adverse. More than 2,000 FELA cases are filed each year in the federal courts alone. *See* Annual Report of the Director of the Administrative Office of the United States Courts at Table C2 (1986). Most, if not all, of these involve claims by injured railroad workers for lost future earnings. This number, large as it is, ignores the many FELA actions brought in state court, as well as the litigation under the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act, and the antitrust, securities and civil rights statutes, similarly gov-

erened by federal substantive law and presenting issues of lost future income or profits. It also understates the impact on the computation of damages in Federal Tort Claims Act proceedings, which, though based on state law, are frequently guided by the pronouncements of federal courts in FELA cases. *See, e.g., Barnes v. United States*, 685 F.2d 66 (3d Cir. 1982).

In sum, the conflict engendered by the decision below, and inherent in the multiplicity of approaches taken by the Circuit Courts in the aftermath of *Pfeifer*, clouds every federal action to recover future losses. Until resolved by this Court, it threatens to turn such proceedings into graduate economics seminars with results varying whimsically according to the locus of trial.

II. THE DECISION TO HOLD THE B & O LIABLE FOR NEGLIGENCE UNDER FELA IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, IS INCONSISTENT WITH THE INTENT OF THE ACT, AND IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

A.

The panel's opinion on liability (App. 5a-9a), which was adopted by the five of nine majority of the *en banc* Fourth Circuit (App. 19a-20a), is premised on its conclusion that the circumstance of a railroad crossing "partially blocked for at least fifteen minutes in the early hours of the morning" should, without more, have been "reasonably foreseen . . . [to] have incited some senseless motorist to take reckless action" (App. 9a), despite Aldridge's complete inability to point to any occasion in the past where this type of criminal act had occurred or even a single instance where the presence of a crossing watchman armed with lights had been ineffective to control traffic in the intersection.

In fact, as the trial record establishes, and assuming the facts to have been as posited by Aldridge, the only

reasonably foreseeable risk associated with the B & O's conduct was that, absent a watchman, impatient drivers might be tempted to pass through the partially blocked crossing. The possibility that a motorist might ignore the warnings of a watchman in station, like Aldridge, and then run him down, was not and could not reasonably have been foreseen.

Yet such foreseeability is, and must be, "an essential ingredient" of FELA, no less than common law, negligence. *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963). Congress, in enacting the FELA, deliberately chose to make an interstate railroad employer's liability uniformly dependent on proof of its negligence.

The proponent of the measure in the Senate deflected criticism concerning possible ambiguity in the bill's language by asserting, at 60th Cong. Rec. 4541 (1908) (Remarks of Sen. Dolliver):

> I have never been able to understand where these fine figures of speech come from which make out that the carrier can be held responsible for damages occurring by outsiders, by tramps, and so forth; by persons throwing rocks through the windows, and all that sort of thing. All this phraseology is limited by the last six lines of the section, and the damages are distinctly said to be "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

Shortly thereafter, in the landmark *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1917) decision, the Supreme Court held that the Act provides the exclusive remedy for injured interstate railway employees, superseding state workmen's compensation laws even where the employer's lack of negligence precludes recovery under FELA. According to the Court,

> Congress, in its discretion acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negli-

> gence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it. . . . The committee reports upon the bill show that this principle was adopted deliberately, notwithstanding that there were those within and without the committees who looked with greater favor upon a different principle which put negligence out of view and regards the employee as entitled to compensation wherever the injury is an incident of the service which he is employed. . . . Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability.

Winfield, 244 U.S. at 150-154.

As this Court explained in *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943), the negligence standard of FELA is the same as the common law definition, so that:

> the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done.

And as stated in *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649, 653 (1947):

> The Act does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. And that negligence must be "in whole or in part" the cause of the injury.

See also Southern Ry. Co. v. Gray, 241 U.S. 333, 338 (1916); *Urie v. Thompson*, 337 U.S. 163, 182 (1949); *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 537-538 (1957) (separate opinion of Frankfurter, J.); *Sinkler*

v. Missouri Pacific R.R. Co., 356 U.S. 326, 333 (1958) (separate opinion of Harlan, J.).

Since the deliberately adopted basis of liability under the Act is negligence, meaning the failure to exercise ordinary care under the circumstances, an essential prerequisite to the determination that a person has failed to exercise such care is the reasonable foreseeability of the risk of harm. In *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483-484 (1943), the Court declared that:

> Events too remote to require reasonable prevision need not be anticipated. * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

B.

This Court has given substance to its consistent admonition that the "Act does not make the employer an insurer", *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959), by refusing to permit a jury to consider a FELA claim absent credible evidence of reasonable foreseeability of harm. This is particularly true where the injury complained of is the product of criminal intervention. Thus, as Judge Chapman pointed out in his dissenting opinion below, in circumstances virtually identical to those present in this case, the Supreme Court has held that the conclusion could not reasonably be drawn that "negligence of the employer played any part at all in the injury. . . ." *Id.* In *Inman*, as here, a crossing watchman, furnished by the railroad with warning devices and lamps and standing at a crossing in front of automobiles which had been stopped for some time awaiting passage of a train, was struck by a drunken hit-and-run driver who had proceeded despite the stop signs and lights, in violation of several local traffic statutes. *See Inman v. Baltimore & Ohio R.R. Co.*, 108 Ohio App. 124, 161 N.E. 2d 65, 66 (1958), *aff'd*, 361 U.S. 138 (1959).

Only where the plaintiff's proof establishes that the defendant railroad was aware of conditions creating a "strong likelihood of injury through intentional or reckless misconduct", and yet failed to take reasonable measures to avert such danger, will a FELA claim predicated on the criminal intervention of a third person be submitted to a jury. *Lillie v. Thompson*, 332 U.S. 459, 462 n.4 (1947), *quoting* Restatement of Torts § 302 comment n (1938). The Second Circuit, in conflict with the Fourth Circuit, directs a verdict for the railroad absent "evidence of prior incidents . . . substantially the same as those in the action brought." *Hartel v. Long Island R.R.*, 476 F.2d 462, 464 (2d Cir. 1973), *cert. denied*, 414 U.S. 280 (1973).

C.

The consequences of the *en banc* Fourth Circuit's apparent willingness to ignore the FELA negligence standard, in disregard of the legislative intent as well as of this Court's teachings, are likely to be severely adverse if left uncorrected. As the dissenting opinion below astutely explained:

> The defendant railroad, presumably in light of its experience regarding illegal railway crossings, had posted the crossing watchman Aldridge across the unoccupied opening. Aldridge's function was, by virtue of his position and his lights, which he carried in each hand, to preclude any reoccurrences of the illegal crossings. That precaution duly taken, the event that a drunken motorist would thereupon drive his car illegally through the "opening," thus running over the positioned watchman, was of a kind not previously experienced. "There was 'no evidence of prior occurrences of the kind here under consideration' in the record." *Inman, supra*, at 141, quoting *Inman v. Baltimore & Ohio R.R. Co.*, 161 N.E. 2d at 66. Absent any such evidence, the jury was unable as a matter of law to find that the railroad could have reasonably foreseen the motorist's criminal action. The reasonable foreseeability of the harm,

an "essential ingredient" of negligence in an FELA action, is unproved. *Gallick*, *supra*, at 117.

> The unintended effect of the panel's misapplication of the reasonably foreseeable standard is to render nugatory this "essential ingredient" of negligence. The foreseeability test, as applied by the panel, would adjudge the re-occurrence of an illegal crossing foreseeable even where a "senseless" driver disregarded precautions adopted after the prior occurrences. Because the panel's foreseeability standard does not focus on the foreseeability of re-occurrence in light of the safety precautions adopted, but rather ignores them, the standard knows no bounds: even if, to borrow Justice Whittaker's analogy, the watchman were encased in an armored tank, his being struck by a drunken motorist is foreseeable simply because other motorists, presumably sober but impatient, drove across open track absent a watchman blocking their path. Indeed, under the panel's broad test of foreseeability, the "essential ingredient" can likely be presumed, as a plaintiff can simply point to the fact that an employer had taken a precaution against a certain harm to show that he reasonably foresaw that harm re-occurring.

(App. 25a-26a).

In effect, and in plain derogation of Supreme Court precedent, the majority, poorly serving FELA's purpose to encourage investment in safety measures, *Jamison v. Encarnacion*, 281 U.S. 635 (1930), imposes on railroads the virtually limitless insurance obligation deliberately rejected by Congress.

CONCLUSION

To presume, in light of recent economic experience, that earnings normally keep pace with interest rates on conservative investments, justifying application of the total offset method is to engage in the plainest, and least warranted, speculation in favor of plaintiffs. To impose on defendants the burden of disproving this theory

is both unjust and ill advised, and in the most direct conflict with the pertinent decisions of this Court as well as those of other Courts of Appeals. And to announce such a rule in this case, where evidence of reasonable foreseeability of harm is completely lacking such that the negligence issue should never have been submitted to the jury, compounds these errors and lends additional support to the Petitioner's request that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and reverse the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-1185

GEORGE O. ALDRIDGE and DAISY M. ALDRIDGE,
Appellees,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
a body corporate,
Appellant,

v.

KEITH D. BRELSFORD and
ERIE INSURANCE EXCHANGE,
Defendants.

Argued Oct. 10, 1985

Decided May 1, 1986

Rehearing in Banc Granted
June 24, 1986

Railroad crossing watchman brought action against railroad and motorist for injuries sustained when hit by motorist attempting to go over railroad crossing partially blocked by train. Railroad appealed from judgment of the United States District Court for the District of Maryland, at Baltimore, Walter E. Black, Jr., J., entered

against it on jury verdict in sum of $196,800. The Court of Appeals, Sprouse, Circuit Judge, held that: (1) evidence was sufficient to support finding of negligence, future loss of earnings, and proximate cause, and (2) district court was not required to give instruction on present value of future earnings absent evidence from railroad pertaining thereto.

Affirmed.

Terrence William Boyle, District Judge, sitting by designation, filed concurring opinion.

1. Employers' Liability—208

Evidence concerning train's partially blocking roadway while switching cars and length of time roadway was blocked was sufficient to support finding that railroad was negligent in manner in which it blocked crossing to permit railroad crossing watchman to recover under Federal Employers' Liability Act for injuries sustained when hit by intoxicated motorist attempting to cross. Federal Employers' Liability Act, §§ 1-10, as amended, 45 U.S.C.A. §§ 51-60.

2. Employers' Liability—212

Testimony of railroad crossing watchman that pain in neck, as a result of being hit by motorist attempting to pass through crossing partially blocked by train, was so great that he could not work, was sufficient evidence of crossing watchman's inability to perform duties to support award for future loss of earnings, though there was expert evidence to contrary. Federal Employers' Liability Act, §§ 1-10, as amended, 45 U.S.C.A. §§ 51-60.

3. Employers' Liability—212

Evidence that railroad crossing watchman had no pain prior to accident at crossing when motorist attempted to pass through crossing partially blocked by train, despite

preexisting arthritic condition in neck, and that after accident pain was so severe it eventually precluded him from performing job, was sufficient to support finding that injury and resulting inability to work were caused by accident and not preexisting condition, to permit recovery under Federal Employers' Liability Act. Federal Employers' Liability Act, §§ 1-10, as amended, 45 U.S.C.A. §§ 51-60.

4. Federal Civil Procedure—1973
Federal Courts—905

Generally, coverage or noncoverage of party by liability insurance is not probative of any issue in negligence case and introduction of subject is reversible error.

5. Federal Courts—905

Explanation to jury by insurer of railroad crossing watchman that it was permitted to intervene as party defendant in action by watchman against railroad and motorist as result of watchman's being hit by motorist passing through crossing partially blocked by train by virtue of uninsured motorist provision of watchman's policy avoided possible confusion and allowed jury to concentrate on real issue in case, and disclosure of fact that motorist was uninsured as consequence did not require reversal.

6. Federal Courts—628

Admission of local ordinance relating to amount of time train may block crossing, in action resulting from injuries sustained by railroad crossing watchman when motorist attempted to go through crossing partially blocked by train, was not plain error, and failure to consider previously unraised point would not result in fundamental injustice, particularly where trial court struck ordinance from evidence and instructed jury that evidence was not applicable and that they were to disregard

it. Federal Employers' Liability Act, §§ 1-10, as amended, 45 U.S.C.A. §§ 51-60.

7. Damages—173(1), 226

Awards for loss of future earnings in federal actions should be reduced to present value and, thus, refusal to receive evidence of present value of future lost wages or failure to give requested instruction on present value is error.

8. Damages—173(1)

Principle that refusal to receive evidence of present value of future lost wages in federal action is error must be applied consistent with tenet that instructing jury on theory which is unsupported by evidence presented at trial is also error.

9. Damages—163(1), 173(1)

Defendant has burden of presenting evidence probative of appropriate interest rate and method of discount if defendant wishes fact finder to reduce gross amount of future lost wages to present value; plaintiff, in turn, may offer evidence tending to prove that award should be increased because inflation will diminish its current value, including what kind of and how much inflation; refusing to follow *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3d Cir.).

10. Damages—201(1)

District court does not commit error by failing to instruct jury as to appropriate economic adjustment absent relevant evidence of discount or inflationary rates offered by either party to action.

11. Employers' Liability—262

District court was not required to instruct jury to reduce award to railroad crossing watchman, as result of

nis being hit by motorist passing through crossing partially blocked by train, to present value, where railroad failed to introduce competent evidence from which jury could have determined present value of watchman's proved future lost earnings. Federal Employers' Liability Act, §§ 1-10, as amended, 45 U.S.C.A. §§ 51-60.

George F. Pappas (H. Russell Smouse, Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A., C. Keith Meiser, on brief), for appellant.

Richard R. Beauchemin (Norris W. Tingle, Geoffrey, J.C. Boyd, on brief), for appellees.

Before SPROUSE and WILKINSON, Circuit Judges, and BOYLE, United States District Judge for the Eastern District of North Carolina, sitting by designation.

SPROUSE, Circuit Judge:

The Baltimore & Ohio Railroad Company (the Railroad) appeals from a judgment entered against it after a jury verdict in the sum of $196,800 in favor of George Aldridge in this Federal Employers' Liability Act (FELA) suit. 45 U.S.C. §§ 51-60 (1982). Aldridge filed suit after he suffered a neck injury while working for the Railroad as a crossing watchman. The Railroad contends that the district court erred in not granting its motions for a directed verdict or a judgment n.o.v.; in allowing Aldridge's intervening insurance company to reveal to the jury that the Railroad's co-defendant was uninsured; in admitting into evidence a city ordinance relating to the length of time a train can remain on a crossing; and in failing to require Aldridge to prove the present value of his claim for future lost wages or, in the alternative, to instruct the jury to reduce any award for future lost wages to present value. We affirm.

George Aldridge was a crossing watchman for the Railroad assigned to the Baltimore Street crossing in Cumberland, Maryland. In the early morning of September 9, 1978, a Railroad engine engaged in switching cars approached the Baltimore Street crossing. As the engine approached, Aldridge manually activated the traffic lights to a red position for all lanes of vehicular traffic which converged on the crossing. The engine proceeded onto the crossing and stopped in a position by which it blocked ½ to ⅞ of Baltimore Street. Aldridge then positioned himself in the portion of the crossing not occupied by the engine. He carried a light in each hand. Keith Brelsford, a highly intoxicated motorist, stopped short of the crossing, but grew impatient and shouted to Aldridge his desire to cross. Despite Aldridge's warning not to cross, Brelsford repeatedly accelerated his engine, then, without warning, released his brakes and drove his car across the opening of the crossing, striking Aldridge and knocking him to the ground. Brelsford drove on without stopping.[1]

There was considerable evidence concerning the Railroad's procedure for switching cars in the vicinity of street crossings. The normal procedure was either to block the entire crossing or to cut the train so that traffic could pass. It was uncommon to block only part of the crossing. In addition, the Railroad's internal operating rules required:

> The engine bell must be rung when an engine is about to move, except after momentary stops in con-

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[1] Later that day, Brelsford presented himself to the Cumberland Police. He admitted driving the car which struck Aldridge and that he had consumed eight or nine beers prior to the accident. Brelsford was charged with failure to remain at the scene of an accident resulting in bodily injury, reckless driving, and failure to obey a railway watchman. He was found guilty by a Maryland court and fined $750. He was later convicted of common law assault and sentenced to ten days in jail.

> tinuous switching movements. It must be rung while approaching and passing public crossings at grade and stations, and through tunnels.

There was conflicting testimony concerning the length of time the engine was stopped on the crossing prior to the accident and whether its bell was ringing. Aldridge's evidence was that the engine was stopped on the crossing for approximately fifteen to twenty minutes and the engine bell was not ringing. The Railroad's evidence indicated that the engine was stopped on the crossing for only two to five minutes and the engine bell was ringing the entire time.

Following the accident, Aldridge was taken to the hospital by ambulance, x-rayed, and released. He continued to receive medical attention for his neck, including medication, therapy, and traction, and he was authorized to return to work approximately seventy-five days after the accident.[2] After returning to his job at the crossing, Aldridge continued working until January 3, 1981. At that point, according to his testimony, he stopped working because he could no longer stand the pain in his neck.

Medical evidence at trial indicated that Aldridge did not suffer neck pain prior to the accident, that the accident caused the pain by aggravating a preexisting neck condition, and that the pain will be of a permanent duration. It is unquestioned that Aldridge had a preexisting degenerative condition between three vertebrae in his cervical spine which would have continued to degenerate even without his injury from the accident. The Railroad's medical expert admitted, however, that trauma imposed upon the preexisting neck condition would likely produce pain even if none previously existed. There was conflicting evidence concerning Aldridge's ability to work after

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[2] Because he took vacation time after his medical release, Aldridge did not actually return to work until December 24, 1978, some 106 days after the accident.

January 3, 1981. Aldridge testified that he was unable to work after that time, but medical experts testified that he remained capable of performing his duties as a crossing watchman.

A.

The Railroad contends that there was insufficient evidence to support a finding of negligence, future loss of earnings, or proximate cause of the injury. In testing the sufficiency of the evidence, we must view the evidence in the light most favorable to the jury's verdict and afford the prevailing party the benefit of all reasonable inferences which can be drawn from the evidence. *Krotkoff v. Goucher College*, 585 F.2d 675, 677 (4th Cir. 1978). Applying this standard, we believe there is adequate evidence to support the jury's conclusion on each of the points challenged by the Railroad.

[1] First, the Railroad asserts that even under the less stringent FELA standards there was insufficient evidence to permit the case to go to the jury on the issue of liability. It argues that Brelsford's negligence was the sole cause of Aldridge's injury. We agree, of course, that Brelsford's negligence or intentional conduct was the predominant cause of Aldridge's injuries. There is no question, however, that there was sufficient evidence from which a jury could find that the Railroad was negligent in the manner in which it blocked the crossing. While there was conflicting evidence on several factual issues, considering the evidence, as we must, in a light most favorable to Aldridge, the train occupied the crossing for a period of fifteen to twenty minutes, and, rather than block the entire crossing, the Railroad left half of the street open. In addition, the jury could have found that the Railroad employees were negligent in not ringing the engine bell. It was reasonable for the jury to infer that the Railroad's negligence was a factor in provoking

Brelsford to react in the foolish and criminal manner which resulted in Aldridge being injured. In sum, we are unable to say that the trial court erred in not ruling as a matter of law that the Railroad's negligence did not "play[] any role in producing the harm." *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 116, 83 S.Ct. 659, 664, 9 L.Ed.2d 618 (1963). *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957); *Coray v. Southern Pacific Co.*, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949).

Reasonable foreseeability is, of course, an essential ingredient to establishing negligence in a FELA case, as in other negligence actions. In the instant case, however, as in *Gallick*, the jury was instructed on the requirement of reasonable foreseeability. *Gallick*, 372 U.S. at 118, 83 S.Ct. at 665. From their verdict in favor of Alrdidge, it is clear that the jury concluded that the Railroad should have realized the increased likelihood of a car striking Aldridge under the circumstances. *Id. at* 118-19, 83 S.Ct. at 665-66. The evidence sufficiently supports that conclusion. The crossing was partially blocked for at least fifteen minutes in the early hours of the morning. There was testimony that occasionally motorists would illegally cross in front of a train when the crossing was only partially blocked. It is certainly not difficult to anticipate that motorists using the streets of Cumberland, Maryland might have an infinite number of reasons to be anxious to reach their destinations. Likewise, it should be easily foreseeable that many motorists, inebriated or not, might be unduly excited or frustrated because of real or imagined intrusions upon their rights to use the common streets and highways. We cannot say as a matter of law that a defendant railroad should not have reasonably foreseen that negligence potentially affecting the broad spectrum of highway users would not have incited some senseless motorist to take reckless action.

[2] The Railroad also attacks the sufficiency of the evidence relating to Aldridge's inability to perform his duties as a crossing watchman. We disagree with the Railroad and find the evidence sufficient to make this ultimate factual issue a question for the jury to resolve. It is true that this evidence consisted solely of Aldridge's testimony that the pain in his neck was so great that he could not work. His testimony, however, was not discredited, and although there was expert evidence to the contrary, the ultimate authority for weighing the totality of evidence reposes in the jury. *Price v. Admiral Corp.*, 527 F.2d 412, 415 (5th Cir. 1976) (jury at liberty to accept or reject expert testimony). *See Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959).

[3] Similarly, the Railroad's third argument that there was insufficient evidence to prove that Aldridge's inability to work was proximately caused by the accident involves factual issues properly resolved by the jury. There is no question that Aldridge had a preexisting arthritic condition in his neck. He testified, however, that he had no pain prior to the accident and that after the accident the pain was so severe that it eventually precluded him from performing his job. Medical experts, including those for the Railroad, testified that Aldridge never complained of pain prior to the accident and that the injury he received could have aggravated his preexisting neck condition to the extent that it would have caused pain where none previously existed. We believe this was sufficient evidence upon which the jury could find that Aldridge's injury and resulting inability to work were caused by the accident and not his preexisting condition. *Sentilles*, 361 U.S. at 109-10, 80 S.Ct. at 175.

B.

The Railroad's remaining arguments are that the district court committed errors of law in allowing Aldridge's intervening insurance company to advise the jury that

Brelsford was uninsured; in admitting into evidence a Cumberland municipal ordinance relating to the length of time a train can remain on a crossing; and in failing to require Aldridge to prove the present value of his claim for future lost wages or, in the alternative, to instruct the jury to reduce any such award to present value.

[4, 5] We need not linger long over the first of these arguments. Since Brelsford was uninsured Aldridge's insurance carrier, Erie Insurance Exchange (Erie), was allowed to intervene as a party defendant pursuant to the uninsured motorist provision of Aldridge's policy. In its opening statement, Erie explained its presence as a defendant to the jury, including the fact that Brelsford was uninsured. As a result, the Railroad moved for a mistrial, which the district court denied. The general rule, of course, is that the coverage or noncoverage of a party by liability insurance is not probative of any issue in a negligence case and introduction of that subject is reversible error. *Langley v. Turner's Express, Inc.*, 375 F.2d 296 (4th Cir.1967). This case, however, did not involve the typical instance of either plaintiff or defendant apprising the jury of the presence or absence of insurance. Erie was a party by intervention, and a jury might well have been mystified as to why an insurance company was a co-defendant in a case involving a railroad and a named individual as the other defendants. Under these circumstances an explanation to the jury could have avoided possible confusion and allowed the jury to concentrate on the real issue in the case. The possibility of prejudice to the Railroad, moreover, was minimal.

[6] The railroad next argues that admission of the Cumberland municipal ordinance relating to the amount of time a train may block a crossing was error because the ordinance was enacted to control traffic, therefore, evidence of a violation is not probative of negligence on facts such as involved here. Aldridge contends that the

Cumberland ordinance is broader than most similar ordinances and was intended to prevent both delays of traffic and accidents such as the one involved in this case. If so, the ordinance might be probative, but it is not necessary to decide that question. The Railroad did not object to the admission of the ordinance, and we simply will not consider objections not raised at trial in the absence of plain error. *Bryant v. Sears, Roebuck & Co.*, 435 F.2d 953, 956 (4th Cir. 1970); *cf. United States v. Barge Shamrock*, 635 F.2d 1108, 1111 (4th Cir. 1980), *cert. denied*, 454 U.S. 830, 102 S.Ct. 125, 70 L.Ed.2d 107 (1981). The admission of the ordinance was not plain error, and we perceive no fundamental injustice in now refusing to consider this previously unraised point. Moreover, prior to closing arguments, the trial court struck the ordinance from evidence and instructed the jury that the ordinance was not applicable and that they were to disregard it. We think any error in admitting the evidence was cured by the instruction to disregard it. *See Purex Corp. v. St. Louis National Stockyard Co.*, 374 F.2d 998 (7th Cir.), *cert. denied*, 389 U.S. 824, 88 S.Ct. 59, 19 L.Ed.2d 77 (1967). *See generally* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2885 (1973).

The Railroad's last argument relates to the longstanding principle of damages that the amount of future lost wages must be reduced to present value. *Chesapeake & Ohio Railway Co. v. Kelly*, 241 U.S. 485, 36 S.Ct. 630, 60 L.Ed. 1117 (1916). At the close of the trial, Aldridge argued to the jury that it should value his future lost wages at $16,306 a year for the next seven years until age 65 for a total of $114,142. The Railroad moved for a mistrial on the grounds that Aldridge's failure to introduce evidence from which the jury could reduce future lost wages to present value was reversible error. The district court denied that motion and the Railroad's subsequent motion for an instruction that the jury must dis-

count any award for future lost wages to present value. The jury returned a verdict in favor of Aldridge in the amount of $196,800.

[7,8] Awards for loss of future earnings in federal actions should be reduced to present value. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 536-37, 103 S.Ct. 2541, 2550-51, 76 L.Ed.2d 768 (1983.)[3] Thus, as a matter of federal law, the refusal to receive evidence of the present value of future lost wages or the failure to give a requested instruction on present value is error. *St. Louis Southwestern Railway Co. v. Dickerson*, —— U.S. ——, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). Courts, however, must apply these principles consistent with the tenet that instructing the jury on a theory which is unsupported by the evidence presented at trial is also error. *See Salem v. United States Lines Co.*, 370 U.S. 31, 39, 82 S.Ct. 1119, 1124, 8 L.Ed.2d 313 (1962) (Harlan, J., dissenting in part and concurring in part); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 77-79, 27 S.Ct. 412, 418-19, 51 L.Ed. 708 (1907); *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 38-41 (4th Cir. 1963).

The Supreme Court has not allocated the burden of proceeding or the burden of persuading the jury as to either the reduction to present value or the increase for inflation. Simply stated then, the issue is whether reduction to present value is an indispensable element of the plaintiff's claim for future lost wages which he must always prove by specific evidence or whether, absent contest by the defendant, the plaintiff sufficiently proves his claim by evidence of the gross amount of those lost wages. This approach, however, overlooks many complicated issues which arise in this amorphous area combining law and economics. As the Supreme Court said

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[3] Concomitantly, it is appropriate to increase an award for loss of future earnings by a formula which accounts for reduction in future value by the ravages of inflation. *Pfeifer*, 462 U.S. at 538-51, 103 S.Ct. at 2551-57.

in *Pfeifer*, "the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others." 462 U.S. at 547, 103 S.Ct. at 2555. Added to this obstacle of prediction are the many factors which can complicate the calculations of present value admirably discussed in *Pfeifer*: Should the discount rate be a "market" interest rate or a "real" interest rate adjusted for inflation, and, if the latter, for what period or periods of inflation? 462 U.S. at 541-43 & n.26, 103 S.Ct. at 2552-54 & n.26. To prove that the gross amount of future wages established should be increased because projected inflation is greater than projected interest rates, what type of inflation should a plaintiff use-pure economic inflation or the various types of individual and societal inflation discussed by the Court in *Pfeifer*, e.g., future production efficiency, increased skills and different collective bargaining approaches? 462 U.S. at 535-36, 549-51 & n.31, 103 S.Ct. at 2549-50, 2556-57 & n.31. These factors make it clear that the question of allocating the burden of proof is not one dimensional.

[9] The Ninth Circuit resolved the problem by holding in effect that the party who would benefit from the application of a particular economic formula has the burden of producing competent evidence to prove it. *Alma v. Manufacturers Hanover Trust*, 684 F.2d 622, 626 (9th Cir.1982). Contra *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394, 395 (3d Cir.1984) (burden of producing evidence of present value of future lost wages rests on plaintiff). If a defendant wishes the factfinder to reduce the gross amount of future lost wages to present value, he can present evidence probative of an appropriate interest rate and method of discount. The Plaintiff, in turn, may offer evidence tending to prove that the award should be increased because inflation will diminish its current value. In that case, the plaintiff must show what kind of and how much inflation. *See*

Pfeifer, 462 U.S. at 534-36, 538-51, 103 S. Ct. at 2549-50, 2551-57. We think this is a sensible approach. In most cases, the factors are simple, and it should be a light burden for the defendant to prove a proper discount rate or for the plaintiff to prove the probable effects of inflation. As noted by the Court in Pfeifer, "[t]he average accident trial should not be converted into a graduate seminar on economic forecasting.'" 462 U.S. at 548, 103 S.Ct. at 2556 (quoting *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39 (2d Cir. 1980), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2049, 68 L.Ed.2d 351 (1981). To the extent that the issue in a given case necessarily becomes difficult, it seems fair to place the burden of procuring and presenting economic evidence on the litigant who would benefit from its acceptance by the factfinder.

[10] A trial court, of course, must admit relevant evidence of discount or inflationary rates offered by either party and grant a tendered instruction based on that evidence. In the absence of such evidence, however, the court does not commit error by failing to instruct the jury as to the appropriate economic adjustment. If the litigants are represented by normally competent counsel, any omission of proof or failure to proffer instructions probably will have resulted from deliberate trial strategy. Defense or plaintiff's counsel may well be satisfied with the unadjusted amount of future lost wages-fearing the consequences of encouraging the factfinder to consider the use of other economic factors. As the Sixth Circuit stated in *Kokesh v. American Steamship Co.*, 747 F.2d 1092, 1096 (6th Cir. 1984):

> Litigants in the federal courts frequently agree to forego the time and expense involved in proving inflationary trends and discount rates in trials involving lost future wages. In many cases, defense counsel may wisely conclude that there is little benefit to be gained and substantial prejudice to be

risked in giving the jury a very particularized instruction on the calculation of damages.

[11] In the instant case, the litigants were represented by competent counsel. Aldridge proved the dollar amount of his future lost earnings. It would have been to the Railroad's advantage to give the jury an opportunity to reduce this amount by introducing competent evidence from which the jury could have determined its present value.[4] We do not think the Railroad, having failed to present such evidence at trial, should be permitted on appeal to complain of its absence. See *Deakle v. John E. Graham & Sons*, 756 F.2d 821, 830-31 (11th Cir.1985).

We also think it would have been extremely confusing to the jury to ask it to make these economic adjustments without an evidentiary basis or an explanation by experts as to show such calculations could be made. Application of the principle of present worth (and, likewise, the principle of indexing for inflation) is beyond the understanding and capabilities of most lay persons serving on a jury. *Kelly*, 241 U.S. at 491, 36 S.Ct. at 632. Without evidence of how to adjust for present value or inflation, a jury instructed to make such calculations on its own might well present an award based on sheer speculation.

In the absence of any evidence by which future lost wages could be reduced to present value, we see no error in the district court's failure to grant a mistrial or to instruct the jury to undertake the task by utilizing its own initiative.

In view of the above, the decision of the district court is affirmed.

AFFIRMED.

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[4] Likewise, it would have been to Aldridge's advantage to give the jury an opportunity to increase this amount by the forces of inflation. Therefore, it was his prerogative and responsibility to introduce competent evidence which would have allowed the jury to do so.

BOYLE, District Judge, concurring:

I concur in the result reached by the majority and join in their reasoning on all but one issue. That issue is the allocation of the burden of proof for the present value of lost future earnings. In my opinion, that burden must rest with the plaintiff.

We are in agreement that lost future earnings must be reduced to their present value. *St. Louis Southwestern Railway Company v. Dickerson*, —— U.S. —— 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985), *Jones and Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed. 2d 768 (1983).

The majority places the burden on the defendant to prove this material element of plaintiff's claim.

A defendant has no burden to prove any of the contested material issues of fact in a plaintiff's cause of action. The present value of lost future earnings is not an affirmative defense but rather a material element of the plaintiff's claim for that special damage.

If the plaintiff fails to offer any evidence of one or more of the elements of this special damage, then as a matter of law, the plaintiff's proof has failed and that claim should not be submitted to the jury.

The plaintiff has the burden at all times to prove by some competent evidence each of the material facts of his claim. Where part of plaintiff's case, as it was here, is for the special damage of lost future earnings, then plaintiff must offer some evidence of the earnings, the future term, and the present worth of this sum.

In order to test the sufficiency of the plaintiff's evidence, a defendant must exercise its rights under Rule 50 of the F.R.Civ.P. at the appropriate time at trial. This the defendant failed to do, and for this reason I concur in the result.

Rule 50 provides that a party making the motion base it on specific grounds. The defendant moved pursuant to Rule 50 and based it on "the issue of liability". This motion was renewed at the end of all of the evidence by the defendant "for precisely the same reasons—cited at the close of the plaintiff's case".

The defendant never challenged the sufficiency of the plaintiff's evidence on the special damage of lost future earnings. In particular, the defendant allowed the plainitff to proceed unchallenged through argument without any evidence on the present worth of the lost future earnings. A defendant must make a timely challenge to the sufficiency of the plaintiff's case and the failure to do so will bar relief on motion for JNOV and here on appeal. Under the circumstances presented to the trial judge he correctly refused to charge on the present worth of these lost future wages.

Likewise, the trial judge correctly refused to allow a mistrial based on plaintiff's argument. The argument was faithful to the evidence, even if the evidence was insufficient in law.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-1185

GEORGE O. ALDRIDGE and DAISY M. ALDRIDGE,
Appellees,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
a body corporate,
Appellant,

v.

KEITH D. BRELSFORD and ERIE INSURANCE EXCHANGE,
Defendants.

Argued Oct. 7, 1986

Decided March 25, 1987

George F. Pappas, Baltimore, Md. (H. Russell Smouse; Melnicove, Kaufman, Weiner & Smouse, P.A.; C. Keith Meiser, Baltimore, Md., on brief), for appellant.

Richard R. Beauchemin, Baltimore, Md. (Norris W. Tingle, Geoffrey J.C. Boyd; Arnold, Beauchemin & Tingle, P.A., Baltimore, Md., on brief), for appellees.

Before RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS, Circuit Judges, sitting en banc.

SPROUSE, Circuit Judge:

The Baltimore & Ohio Railroad Company appeals from a judgment entered against it after a jury verdict in

the sum of $196,800 in favor of George Aldridge in this Federal Employers' Liability Act (FELA) suit. 45 U.S.C. §§ 51-60 (1982). Aldridge, a railroad crossing guard employed by the Railroad Company, was struck by an intoxicated motorist who deliberately crossed in front of a railroad engine partially blocking a crossing in Cumberland, Maryland. After a judgment on a jury verdict in his favor, the Railroad appealed to this court raising numerous grounds for reversal, including its principal contentions that it was not negligent, and that the district court erred by refusing to instruct the jury that they must reduce Aldridge's damages to their present value, even in the absence of any trial evidence of present value.

A panel of this court affirmed the judgment of the district court. *Aldridge v. Baltimore & Ohio Railroad Co.*, 789 F.2d 1061 (4th Cir.1986). We granted the Railroad's petition for rehearing *en banc* and now, after rehearing, again affirm. A majority of the *en banc* court, consisting of Judges Phillips, Sprouse, Ervin, Wilkinson, and Wilkins affirm the district court's ruling that the jury's finding of negligence on the part of the Railroad was sufficiently supported by the evidence. Judges Russell, Widener, Hall, and Chapman voted to reverse that holding. A majority of the *en banc* court consisting of Judges Hall, Phillips, Sprouse, Wilkinson, and Wilkins voted under the circumstances of this case to affirm the district court's refusal to instruct the jury to reduce Aldridge's damages to present value. Judges Hall, Sprouse, Wilkinson, and Wilkins would affirm this holding on the reasoning of the original panel opinion. Judge Phillips concurs in this result for the reasons stated in his concurring opinion.

The judgment of the district court is, therefore, affirmed.

AFFIRMED.

PHILLIPS, Circuit Judge, concurring specially:

I concur in the result reached by the majority which affirms both as to liability and damages.

I write specially on the damages issue because I believe that the district court erred in declining to instruct the jury that it should award only the present value of lost future earnings, but I would hold that this error was harmless under the circumstances.

The Supreme Court has recently reiterated the long-standing rule that defendants in FELA cases are "entitled," upon request, to such a jury instruction.[1] *St. Louis Southwestern Railway Co. v. Dickerson*, 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303 (1985) (per curiam). But the Court has not spoken to the related but independent question of which party has the burden of proof with respect to factors that would either decrease or increase the gross amount of lost earnings to reflect their present value. This, in fact, is the issue that has mainly divided the lower federal courts on the general matter. *Cf. e.g. Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622 (9th Cir.1982) (burden on defendant); *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3d Cir.1984) (burden on plaintiff). This circuit has not decided that issue and it is therefore an open one with us. Because I believe that its resolution actually controls the nature of a party's entitlement to the instruction reqeusted but not given here, I think we should decide it now.

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[1] This jury instruction rule is in turn based upon the underlying "substantive-remedial" rule that, in conformity with the general "lump sum compensatory award" approach of federal law, the measure of compensability for a lost stream of expected income is necessarily its present value. See Jones & Laughlin Steel Corp. v. Pfeifer, 462, U.S. 523, 533, 103 S.Ct. 2541, 2548, 76 L.Ed. 2d 768 (1983).

On that open question, I would hold that each party has the burden with respect to factors that tend to favor its respective position: the plaintiff to prove that present value is more than total lost earnings, the defendant that it is less. This, rather than a rule that places the burden to establish present value exclusively on one or the other party seems to me both the most practical and the most conceptually sound basis for allocating the burden of proof on the issue. *See generally* F. James & G. Hazard *Civil Procedure*, § 7.8 (2d ed. 1977).

From this would necessarily flow the corollary rule that a party producing legally sufficient evidence on the issue is entitled to a jury instruction that adequately indicates to the jury how the evidence could be used to convert to present value, either up or down. In particular cases, of course, both sides might produce specific evidence (of inflation or deflation, interest trends, etc.) favorable to their positions. In such cases, each side would be entitled to specific instructions as to how its evidence if accepted might be used to adjust lost earning totals to present value.

On the other hand, failure to produce any specific evidence on the issue should have the normal effect of disentitling a party to any *specific* instruction on the issue. In some cases, this might require instructions specifically favorable to only one of the parties, where only that party produced evidence on the issue. In others, it might disentitle both parties to any specific instructions on the method of converting to present value. In the latter situation, however, both parties would still be entitled, upon request, to a general instruction that in computing any amount due for lost earnings the award should be for present value.[2] That is what *Dickerson* seems to me

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[2] In many cases opposing counsel undoubtedly tacitly agree not to introduce any specific present value evidence, mutually accepting that it would simply wash out or be offset by conflicting evidence,

unmistakebly to hold, but I think that is all it holds. The fact that the *Dickerson* court referred only to defendant's entitlement simply reflects the fact that it was the defendant in that case (as normally it would be) who objected to the failure to give any instruction on the issue.

Where the only entitlement is to such a general instruction, i.e., where neither party has introduced specific evidence on the issue, it is hard to see how the failure to give even a general instruction could be treated as prejudicial. Where a party has produced no specific evidence of factors affecting present value computation, the lack of *any* instruction on the present value issue would seem necessarily harmless error as to that party.

So I would hold here. In faithfulness to *Dickerson*'s most recent recognition of a right in the defendant to have the jury generally instructed to award only present value, it was error here to refuse such an instruction. But where, as here, defendant produced no specific evidence as to how, favorably to it, this should be done, the error is necessarily harmless.

CHAPMAN, Circuit Judge, dissenting:

I.

Concurring in the judgment in *Inman v. Baltimore & Ohio Railroad Company*, 361 U.S. 138, 142, 80 S.Ct. 242, 244, 4 L.Ed.2d 198 (1959), Justice Whittaker stated:

> Reduced to substance, the simple facts are that petitioner, a crossing flagman, while standing in a well-

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or would create more of a risk of damaging confusion than likelihood of benefit. Some courts have indeed adopted a "total offset" approach to avoid or minimize the difficult evidentiary problems that the underlying damages rule inevitably creates. *See Pfeifer*, 462 U.S. at 544-46, 103 S.Ct. at 2554-55. Certainly it should be possible under the federal rule for the parties formally to avoid, by stipulation, any need for or entitlement to even a general present value instruction.

> lighted intersection alongside a passing train in the nighttime and swinging a lighted red lantern in each hand, was struck, knocked down and run over by a drunken driver. What, I ask, did respondent do or omit that caused or contributed to cause that casualty? How could it have prevented the casualty? Petitioner says that respondent failed to provide him with "enough protection." About the only way, as I perceive, that respondent could protect its crossing flagmen against injury from such lawless conduct by third persons would be to provide them with military tanks and make sure they stay in them while within or moving about crossing-intersections in the performance of their duties—and I am not even sure that this method, though ironclad, would be certain protection to a flagman against lawless injury by third persons, for someone might shoot him, an act not very different, it seems to me, from the drunken driver's conduct which injured petitioner in this case, and for which injuries he insists, and four members of this Court agree, a jury should be permitted to require respondent to pay damages. How this can be thought to square with any known concept of "negligence" by respondent is beyond me.

Although not employing as colorful an analogy, the majority in *Inman* held that the conclusion could not reasonably be drawn that "negligence of the employer played any part at all in the injury. . . ." *Id.* at 140, 80 S.Ct. at 243.

It is undoubtedly true that the insistent locomotion of judicial interpretation has over time rendered the railroad employer liable for injuries incurred by his employees in which the employer's "negligence played any part, even the slightest." *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed. 2d 493 (1956). The Act does not make the em-

ployer an insurer, however. *Inman, supra*, at 140, 80 S.Ct. at 243. That the harm complained of was reasonably foreseeable is still "an essential ingredient of Federal Employers' Liability Act negligence." *Gallick v. Baltimore & Ohio Railroad Company*, 372 U.S. 108, 117, 83 S.Ct. 659, 665, 9 L.Ed. 2d 618 (1962).

The panel opinion states that, because "it should be easily foreseeable that many motorists, inebriated or not, might be unduly excited or frustrated because of real or imagined intrusions upon their rights to use the common streets and highways," it was reasonably foreseeable that the train's partial blockage of the railroad crossing would have "incited some senseless motorist to take reckless action." I believe that the panel has misapplied the standard defining reasonable foreseeability.

Because there was testimony that motorists had upon occasion illegally crossed in front of a train partially blocking an intersection, a conclusion that the railroad could reasonably foresee that event re-occurring is correct. That occurrence, however, was not what happened in this case. The defendant railroad, presumably in light of its experience regarding illegal railway crossings, had posted the crossing watchman Aldridge across the unoccupied opening. Aldridge's function was, by virtue of his position and his lights, which he carried in each hand, to preclude any re-occurrences of the illegal crossings. That precaution duly taken, the event that a drunken motorist would thereupon drive his car illegally through the "opening," thus running over the positioned watchman, was of a kind not previously experienced. "There was 'no evidence of prior occurrences of the kind here under consideration' in the record." *Inman, supra*, at 141, 80 S.Ct. at 244, *quoting Inman v. Baltimore & Ohio Railroad Co.*, 108 Ohio App. 124, 131, 161 N.E. 2d 60, 66 (1958). Absent any such evidence, the jury was unable as a matter of law to find that the railroad could have reasonably foreseen the motorist's criminal

action. The reasonable foreseeability of the harm, an "essential ingredient" of negligence in an FELA action, is unproved. *Gallick, supra*, 372 U.S. at 117, 83 S.Ct. at 665.

The unintended effect of the panel's misapplication of the reasonably foreseeable standard is to render nugatory this "essential ingredient" of negligence. The foreseeability test, as applied by the panel, would adjudge the re-occurrence of an illegal crossing foreseeable even where a "senseless" driver disregarded precautions adopted after the prior occurrences. Because the panel's foreseeability standard does not focus on the foreseeability of re-occurrence in light of the safety precautions adopted, but rather ignores them, the standard knows no bounds: even if, to borrow Justice Whittaker's analogy, the watchman were encased in an armored tank, his being struck by a drunken motorist is foreseeable simply because other motorists, presumably sober but impatient, drove across open track absent a watchman blocking their path. Indeed, under the panel's broad test of foreseeability, the "essential ingredient" can likely be presumed, as a plaintiff can simply point to the fact that an employer had taken a precaution against a certain harm to show that he reasonably foresaw that harm re-occurring.

Against the danger of illegal crossings, the railroad interposed a watchman. Against the danger of his being accidentally run over, the railroad gave him lights. Regarding the danger that a drunken driver might ignore both and wilfully run down the watchman, the occurrence was unforeseen. The lonely fact that automobiles had steered around stopped trains and crossed open tracks in the past does not tend to prove that they will do so again in an accelerating automobile in wilful disregard of the value of human life. The issue of negligence should not have gone to the jury.

II.

It is a fundamental rule of law that a plaintiff is entitled only to his provable damages, and no more. Where a plaintiff seeks damages for a value which would have accrued in the future, e.g., lost future wages, and he seeks to acquire that future value presently, then it is a matter of common sense that the future value should be reduced to its present value in order to account for the time value of money. It is this present value which reflects the full damages suffered by the plaintiff, and consequently fully remedies his loss. To permit the plaintiff to acquire a greater value for loss of future wages, above his proved amount, constitutes an unjust enrichment, and should not be sanctioned by law.

It is also a fundamental feature of our legal system that the defendant is not required to produce evidence. The burden of proving injury, negligence, causation, and damages is on the plaintiff, and his failure to do so adequately, even in the absence of any rejoinder by the defendant, entitles the defendant to judgment.

The Supreme Court recently stated that it is "clear" that "a defendant in an FELA case is entitled to have the jury instructed that 'when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only.'" *St. Louis Southwestern Railway Company v. Dickerson*, 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed. 2d 303 (1985) (per curiam), *quoting Chesapeake & Ohio Railroad Company v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916). In the case presented, the defendant requested during trial an instruction regarding the need to reduce damages to present value, which request the district court found sufficient to preclude a waiver of the issue. Thus, it seems self-evident that the defendant was entitled to a present value instruction. Although the panel opinion agrees

with this proposition, it holds that the defendant is not "entitled" to such an instruction unless he has carried his newly imposed burden to lay the necessary evidentiary foundation for the instruction. I believe this imposition has the effect of restricting this entitlement in a manner not sanctioned by the Supreme Court.

Dickerson, supra, involved a case where the plaintiff had presented evidence of his future wage loss. The defendant requested that the judge submit an instruction to the jury to the effect that the jury should reduce the award for lost wages to its present value. It does not appear from the opinion that the defendant produced any evidence on which to base the instruction. The Supreme Court held that, although "no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damage award is error." *Id.* 470 U.S. at 412, 105 S.Ct. at 1349. The Supreme Court reversed on this failure. Similarly, in *Jones & Laughlin Steel Corporation v. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed. 2d 768 (1983), neither party had offered any expert testimony concerning predicted future rates of inflation, interest rates, or their connection. The Supreme Court stated that, "whatever the rate the District Court may choose to discount the estimated stream of future earnings, it must make a deliberate choice. . . ." *Id.* at 552-553, 103 S.Ct. at 2558. Thus the Supreme Court remanded the case to the district court on this issue.

Although the Supreme Court has clearly given lower federal courts latitude in determining by what method they choose to discount awards of future wages to present value, including permitting courts to adopt the "total offset" method, and permitting litigants to stipulate that

present value will not be requested, it does not seem that the Supreme Court has ever wavered from its requirement that the defendant is entitled to a present value instruction. The Supreme Court has held steadfastly to its principle that the defendant is entitled to a present value instruction lest the damages be comprised of "'more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded.'" *Dickerson*, 470 U.S. at 412, 105 S.Ct. at 1349, *quoting Kelly*, 241 U.S. at 491, 36 S.Ct. at 632. Where the parties have failed to introduce evidence of the proper measure of present value, and the defendant has been denied his entitlement to an instruction, the Supreme Court has reversed the judgment. *Pfeifer*.

The principle established by the panel is beguilingly attractive. Clearly a great deal of law can be explained by the proposition that each litigating party should have the burden of proving facts or theories which serve his interest. This principle, however, is but one of many, and must in this instance be considered in light of the less comely, but perhaps better established principle that the plaintiff is entitled to his actual losses, and no more. This latter principle may fail to produce the elegant result, but will serve to respect the prerogative of the defendant to decline to produce evidence, and will furthermore respect the integrity of the judicial system in its difficult task of finding a proper award of damages for loss of future wages. The defendant should not have to carry the burden of laying the evidentiary basis for a present value instruction. I respectfully dissent.

I am authorized to say that Judge RUSSELL and Judge WIDENER join this dissent; Judge HALL joins in Part I and Judge ERVIN joins in Part II of the dissent.

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-81-1566

GEORGE O. ALDRIDGE

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
a body corporate

GEORGE O. ALDRIDGE
and DAISY M. ALDRIDGE, his wife

v.

KEITH D. BRELSFORD,
ERIE INSURANCE EXCHANGE,
Intervening Defendant

Crossclaim

BALTIMORE AND OHIO RAILROAD COMPANY,
a body corporate

v.

KEITH D. BRELSFORD

ORDER

Presently pending in this case is the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New trial filed by defendant, Baltimore and Ohio Railroad Company. The Court has carefully considered defendant's motion, the supporting Memorandum, the Opposition filed on behalf of plaintiff, George O. Aldridge, and defendant's Response to plaintiff's Opposition, as well as oral argument presented by counsel for the respective parties at a hearing herein on December 30, 1983. In accordance with the Court's oral opinion rendered at the conclusion of that hearing, IT IS, this 10th day of January, 1984, ORDERED as follows:

1. That the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial (including the request therein that the Court order a new trial unless plaintiff, George O. Aldridge, agrees to a remittitur), filed herein by defendant, Baltimore and Ohio Railroad Company (Paper 46) BE and the same hereby IS, DENIED, EXCEPT as to defendant's assertion that the Court erred in refusing to instruct the jury on reducing any award for plaintiff, George O. Aldridge's future wage loss to present value, and as to which assertion the Court reserves its decision.

2. That the Clerk shall transmit copies of this Order to counsel of record for all of the parties to this action.

/s/ _____

WALTER E. BLACK, JR.
United States District Judge

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-81-1566

GEORGE O. ALDRIDGE

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BALTIMORE AND OHIO RAILROAD COMPANY,
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GEORGE O. ALDRIDGE
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KEITH D. BRELSFORD

MEMORANDUM OPINION

This case under the Federal Employers' Liability Act was tried before a jury beginning on August 8, 1983. The jury returned a verdict in favor of the plaintiffs, George O. Aldridge and Daisy M. Aldridge. On October 12, 1983, the Court entered judgment in accordance with that verdict.[1] George O. Aldridge was awarded judgment in the amount of $196,800. against both defendant Keith D. Brelsford, as to whom a default judgment had been previously entered, and against defendant Baltimore & Ohio Railroad Company. Mr. and Mrs. Aldridge were awarded a judgment in the amount of $25,000 against defendant Keith D. Brelsford for loss of consortium. On December 30, 1983, this Court heard argument on several post-trial matters and motions, including that of the defendant B & O for judgment notwithstanding verdict or in the alternative, for a new trial (Paper 46). By Order dated January 10, 1984, the Court denied B & O's motion on all grounds except the one presently pending, as to which it reserved its decision. That ground, the subject of this Memorandum Opinion, is whether the Court's decision not to instruct the jury that it could take into account the present value of future wages in assessing damages was error and accordingly, the basis for ordering a new trial limited to the issues of discounting future wages to present value. The issues have been fully briefed, and the Court has had the benefit of oral argument and subsequent correspondence with counsel, (which has been filed in the Court file) and a full discussion with counsel at a chambers conference on April 5, 1984.

The events underlying this motion were as follows. At trial, neither party presented any evidence on the

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[1] A dispute as to apportionment of the judgment between the defendants and George Aldridge's insurance carrier, and the need for input from counsel on that issue, caused the more than three-month delay between the verdict and entry of judgment.

appropriate discount method or rate, the appropriate inflation rate, the tax liability to which the plaintiff's lost wages would be subject, or other "societal forces" that should be taken into account in assessing damages for loss of future wages. See *Jones & Laughlin Steel Corp. v. Pfeifer*, 103 S.Ct. 2541 (1983). The only evidence in this regard was the yearly earnings of George Aldridge ($16,306.) and his work-life expectancy (seven years).

On the final day of trial, before the midday recess, the Court inquired of B & O whether it wished an instruction on discounting wages to present value. B & O had previously requested no such instruction. The Court stated that the matter could wait until after the recess, and that B & O's counsel should consider the issue in the meantime. Upon the resumption of trial, B & O moved for a mistrial,[2] claiming that the plaintiffs' failure to introduce any evidence on the appropriate discount rate was fatal to its case.[3] The following colloquy then ensued:

> THE COURT: Okay. Well, I'll leave that for a higher authority and deny your motion for a mistrial and accordingly also not include any reference to it in my instructions.
>
> MR. PAPPAS: All right. You're not going to say anything then about present—
>
> THE COURT: Oh, no. I don't think most people have the faintest idea what we would even be talking

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[2] A mistrial would not appear to be the appropriate remedy, even if B & O's theory was correct. If the failure of the plaintiffs to introduce evidence on discounting to present value was fatal to their case, the appropriate remedy would seem to be dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

[3] B & O limited the grounds of its mistrial motion to the failure of the plaintiffs to introduce evidence of discount. B & O did not mention the absence of evidence of the other "societal forces."

about. Okay. Well, then I guess we're ready for the jury.

(Thereupon, the jury returned to the Courtroom at 1:40 o'clock P.M.)

As the transcript indicates, the Court denied B & O's motion for a mistrial, holding that a plaintiff's failure to introduce any evidence of the discount rate was not fatal to its case. The Court also refused to instruct on discounting to present value, being of the opinion that, in the absence of any evidence, the instruction would make no sense to the jury. Presumably because no discount instruction would be given, the plaintiff requested no instruction on the effects of inflation. Nor was any instruction on the factor of income tax liability requested. On the basis of the evidence admitted and instructions given, the jury found that Mr. Aldridge was entitled to $161,800. for lost wages and medical expenses. That figure represents a straight calculation of lost wage damages figured by multiplying the number of employment years lost by the plaintiff's annual salary.[4]

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[4] The trial transcript and the evidence clearly establish the $161,800. figure, and that the jury computed future wages by simply multiplying employment years lost by yearly wage. The relevant portion of the transcript reads as follows:

THE CLERK: What amount of damages do you assess as to Mr. Aldridge individually?

THE FORELADY: Damages only, 161,800.
THE CLERK: Would you repeat that, please?
THE FORELADY: $161,800.
THE CLERK: One sixty one—
THE FORELADY: Right.
THE CLERK: —thousand, eight hundred dollars?
THE FORELADY: Right.
THE CLERK: And what amount of damages, if any, do you assess to Mr. and Mrs. Aldridge for loss of consortium?

[Continued]

[4] [Continued]

THE FORELADY: Excuse me. I thought you just wanted me to give you a separate total for the wages and damages. I didn't add the suffering and pain. Do you want me to give you a total for the suffering and pain?

THE CLERK: There was to be a total—

THE COURT: Yes, a total—

THE FORELADY: Oh. Okay.

THE COURT: —for all damages to Mr. Aldridge.

THE FORELADY: Okay. $196,800.

THE COURT: One hundred ninety-six thousand—

THE FORELADY: Thousand, eight hundred.

THE COURT: —eight hundred dollars?

THE FORELADY: Right.

THE CLERK: That's to Mr. Aldridge individually?

THE FORELADY: Right.

THE CLERK: And as to Mr. and Mrs. Aldridge for the loss of consortium what amount of damages, if any, do you assess?

THE FORELADY: $25,000.

THE CLERK: Do you want the jury polled?

MR. PAPPAS: Please.

* * * *

The jury's figure of $161,800. was the amount requested by the plaintiffs in closing argument. That figure, rounded to the nearest hundred dollars was comprised of the following:

a.	Stipulated medical expenses (paid by the Railroad to which they are entitled to a credit)	$ 2,058.52
b.	Stipulated rate of pay as of January 3, 1981 was at the rate of $8,7133 per hour. Using this figure as a wage loss from January 3, 1981 to date of trial, August 8, 1983	45,625.81
c.	Future wage loss projected on the basis of the stipulated hourly rate of $8.7133 was $16,306.00 a year projected to age 65 (7 years)	114,142.00
	TOTAL	$161,826.33

Accordingly, the amount of damages for future wage loss that normally would be subjected to revaluation to reflect "societal forces" is $159,741.48 ($161,800. —$2058.52). Jones & Laughlin Steel Corp. v. Pfeifer, *supra*, 103 S.Ct. at 2551 n.22 (wages subject to discount figured from *date of accident to date of retirement*). And the plaintiff would be entitled to prejudgment interest on $45,625.81 of that award. *Id.*

In answering B & O's argument that it was error to omit the instruction on discounting, the plaintiffs assert that B & O waived any claim of error by not requesting the instruction, not objecting to its omission, or not otherwise preserving the issue. Although the transcript does not show clearly that a request was made or omission objected to, it adequately demonstrates that the issue was preserved. After the Court denied B & O's motion for a mistrial, counsel for B & O stated: "You're not going to say anything about present [value]?" The Court replied, "Oh, no. I don't think most people have the faintest idea what we would even be talking about." The Court understood this to be a request for the instruction, and denied that request. Moreover, the Court was aware that B & O desired an instruction on the discount, and the Court considered that desire and the propriety of such an instruction before deciding not to give it. In that light, this Court is of the opinion that B & O has not waived its objection to the lack of an instruction on present value.

Even though the issue was preserved, the Court finds that, on the facts of this case, B & O was not entitled to the instruction. Neither party had introduced any evidence on discounting damages to present value. Under those circumstances, instructing the jury on discounting would be confusing and improper. The Ninth Circuit has recently addressed this precise issue in *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622 (9th Cir. 1982). *Alma* involved a suit under the Jones Act, in which the defendant claimed on appeal that the trial court erred by not discounting the award to present value even though no evidence on that subject had been produced. In addressing this contention, the Ninth Circuit stated:

> In either a jury or a non-jury trial, the damage evidence presented may lead to one of three computations. Where, as here, neither party provides com-

> petent evidence of the inflation rate or the discount rate, the district court must make a lump sum award that is not adjusted for either factor. We specifically reject Maritime's claim that the trial judge is obligated to determine an appropriate discount rate without evidence to reach that determination. The rate is an evidentiary issue, and thus it is the responsibility of the parties to produce evidence of the rate that is appropriate. *Chesapeake & Ohio Railway Company v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916).

Id. at 626. The court then went on to state that it was the responsibility of the plaintiff to introduce evidence on the inflation rate, and of the defendant to introduce evidence on the discount rate. Thus, under *Alma*, B & O was not entitled to an instruction on the discount, because it had not offered any evidence on the point.

The Court is persuaded that the *Alma* approach makes excellent sense. Adjusting damages to reflect societal forces is a matter for the trier of fact. *Jones & Laughlin Steel Corp. v. Pfeifer, supra*, 103 S.Ct. at 2551. Calculating a proper award of future earnings is complicated, involving the use of an appropriate inflation rate, discount rate, and income tax rate. Even with the aid of evidence, the procedure is confusing. Without evidence, arriving at a correct figure is probably an impossible task for even the most sophisticated jury. Thus, without some evidence of the correct factors to be considered, instructing the jury that they may adjust damages can only serve to confuse, with little hope of leading it to the correct result. Accordingly, without any competent evidence to guide the jury, an instruction on adjusting damages is not appropriate.

Finally, in a letter dated April 5, 1984, B & O contended that damages should have been calculated to reflect Mr. Aldridge's after-tax wages instead of the gross wages used by the jury. Undoubtedly, this would have been the

correct procedure, had evidence on Mr. Aldridge's after-tax wages been introduced. *See Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980) (error in failing to *admit the testimony of defendant's expert* on the plaintiff's tax liability; damages for future wage loss to be calculated on after-tax rather than gross income). But in the absence of evidence on the effect of income taxes, a jury cannot be required to apply the tax factor, just as it cannot be required to apply inflation and discount rates in the absence of that evidence. In any event, B & O's request for a new trial on this basis is belated; there was no requested instruction on this factor, nor was it timely raised in any post-judgment motion.

Accordingly, B & O's motion for a new trial on the ground that the Court erred in not giving an instruction on discounting future wage loss to present value—as to which ground the Court reserved decision in its Order dated January 10, 1984—will be denied. A separate Order will be entered to confirm this ruling.

/s/ _____

WALTER E. BLACK, JR.
United States District Judge

Dated: April 25, 1984.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-1185

GEORGE O. ALDRIDGE, *et al*,
Appellees,

versus

BALTIMORE AND OHIO RAILROAD COMPANY, *etc.*,
Appellant,

versus

KEITH D. BRELSFORD, *et al*,
Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener, Hall, Phillips, Murnaghan and Chapman voted to rehear the case in banc; and Judges Sprouse and Wilkinson voted against rehearing the case in banc. Chief Judge Winter and Judge Ervin disqualified themselves from the voting. A majority of the judges having voted to grant rehearing in banc,

IT IS ORDERED that rehearing in banc is granted.

IT IS FURTHER ORDERED that the parties are granted leave to file supplemental briefs. The Court is particularly interested in the issue of liability and the issue of whether the district court erred in not requiring the plaintiff to prove the present value of future earnings. The parties may brief any additional issues which they deem appropriate. Appellant shall serve and file its supplemental brief on or before *July 25, 1986* and appellees' supplemental brief shall be served and filed on or before *August 25, 1986*. Appellant's supplemental reply brief, if any, shall be served and filed on or before *September 8, 1986*. This case shall be calendared for argument at the October Session of court.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Sprouse, Judge Wilkinson and Judge Boyle, United States District Judge sitting by designation.

FOR THE COURT—BY DIRECTION

JOHN M. GREACEN

CLERK